

PATRICIA SPARKS
Claimant

K MART CORPORATION
Respondent
Self-Insured

KANSAS WORKERS COMPENSATION FUND

ORDER

APPEARANCES

RECORD AND STIPULATIONS

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for a scheduled injury to the left arm as provided by K.S.A. 1992 Supp. 44-510d. Claimant requested this review and contends she is entitled to benefits for an injury to the

body as provided by K.S.A. 1992 Supp. 44-510e because she allegedly injured the right arm also.

At oral argument the respondent and Workers Compensation Fund (Fund) agreed that the Administrative Law Judge mistakenly set forth their stipulation regarding Fund liability. By written stipulation, the respondent and Fund have agreed that they will equally share liability if claimant is entitled to an award for a nonscheduled injury. However, the respondent and the Fund also agreed that the Fund would have no liability if the claimant's award is based upon a scheduled injury only. At oral argument the respondent also requested the Appeals Board to review the Judge's computation of temporary partial disability benefits.

The issues now before the Appeals Board are the nature and extent of claimant's disability and the computation of the temporary partial disability benefits due claimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award of the Administrative Law Judge should be modified to effectuate the stipulation between the respondent and the Fund.

The respondent admits claimant injured her left arm while working for the company as a checker, but denies claimant injured her right arm during the period of the alleged accident, June 1992 through May 10, 1993.

Claimant has a ninth grade education and began working for the respondent in November 1975. During the 20 years she has worked for the respondent, claimant has sustained several work-related injuries and in 1985 underwent right carpal tunnel release surgery.

Based upon the evidence presented, the Appeals Board finds claimant has sustained injury to her left arm only during the period alleged. This finding is based upon the testimony of board-certified orthopedic surgeon John A. Tanksley, M.D., who treated claimant from March through August 1993 and who saw her again in December of that year. Although claimant had regular appointments with the doctor between March and August 1993, she did not report right wrist complaints until the December 1993 visit. Dr. Tanksley does not think claimant has carpal tunnel syndrome on the right and believes that her right wrist problems stem from an old, chronic problem which periodically becomes symptomatic. Based upon the fact that claimant never told Dr. Tanksley about her right wrist complaints until December 1993 or received treatment for it from any doctors during the period alleged, coupled with the fact that her most recent nerve conduction tests on the right wrist were normal, the Appeals Board finds Dr. Tanksley's opinion regarding the nonexistence of right wrist injury during the period in question to be credible and persuasive.

The Appeals Board agrees with the finding of the Administrative Law Judge that claimant is entitled permanent partial disability benefits for the left arm injury based upon a 9 percent functional impairment rating. The 5 percent rating falls between the 14 percent provided by orthopedic surgeon C. Reiff Brown, M.D., who saw claimant on one occasion at her attorney's request in December 1993, and the 5 percent rating provided by Dr.

Tanksley. Because both ratings appear to be at the opposite extremes and that claimant's true impairment lies somewhere in between, the Administrative Law Judge properly averaged them.

Based upon the information provided by claimant at the regular hearing, including claimant's Exhibit 2, the Appeals Board finds claimant is entitled to the rounded sum of \$1,176.27 of temporary partial disability benefits for the period she worked part-time after her left carpal tunnel release. According to claimant's exhibit, claimant earned \$1,763.82 less during the period of her temporary partial disability than what she would have otherwise earned as a full-time worker at her pre-injury average weekly wage. Therefore, under K.S.A. 44-510e claimant is entitled to two-thirds of that wage difference, or the rounded sum of \$1,176.27 in temporary partial disability compensation which equates to 5.22 weeks of compensation at \$225.34 per week which will be used to compute the award below.

Based upon the stipulation of the respondent and the Fund, the Fund has no liability in this proceeding because it awards a scheduled injury only.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson dated August 23, 1994 should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Patricia Sparks, and against the respondent, K Mart Corporation, a qualified self-insured, for an accidental injury which occurred June 1992 through May 10, 1993, and based upon a stipulated average weekly wage of \$338.00, for 5.22 weeks of converted temporary partial disability compensation at the rate of \$225.34 per week or \$1,176.27, followed by 18.43 weeks at the rate of \$225.34 per week or \$4,153.02 for a 9% functional impairment to the left arm, making a total award of \$5,329.29 which is ordered paid in one lump sum less any amounts previously paid.

The above computation is based upon 210 weeks from the scheduled injury statute, K.S.A. 1992 Supp. 44-510d, minus 5.22 weeks of temporary partial compensation, or 204.78 weeks, multiplied by 9% which yields 18.43 weeks of permanent partial disability compensation.

Claimant is entitled to medical expense and unauthorized medical expense up to the statutory maximum. Claimant may make application to the Director for future medical benefits.

The Fund is absolved of all liability in this proceeding.

The remaining orders of the Administrative Law Judge are hereby adopted by the Appeals Board as if fully set forth herein to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of May 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James S. Oswalt, Hutchinson, KS
Larry Shoaf, Wichita, KS
Randall Henry, Hutchinson, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director